No. 85-1307

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

NANTAHALA POWER AND LIGHT COMPANY, TAPOCO, INC., AND ALUMINUM COMPANY OF AMERICA,

Appellants,

v.

STATE OF NORTH CAROLINA, *ex rel.* UTILITIES COMMISSION; LACY H. THORNBURG, ATTORNEY GENERAL, *et al.*,

Appellees.

On Appeal from the Supreme Court of North Carolina

APPELLEES' MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM JUDGMENT OF THE NORTH CAROLINA SUPREME COURT

LACY H. THORNBURG
ATTORNEY GENERAL
OF NORTH CAROLINA

Richard L. Griffin
Assistant Attorney General
N.C. Department of Justice
Suite 207
Hayes & Hobson Building
20 South Spruce Street
Asheville, N.C. 28801
(704) 258-6083

Attorneys for: Using and Consuming Public

CRISP, DAVIS, SCHWENTKER PAGE & CURRIN

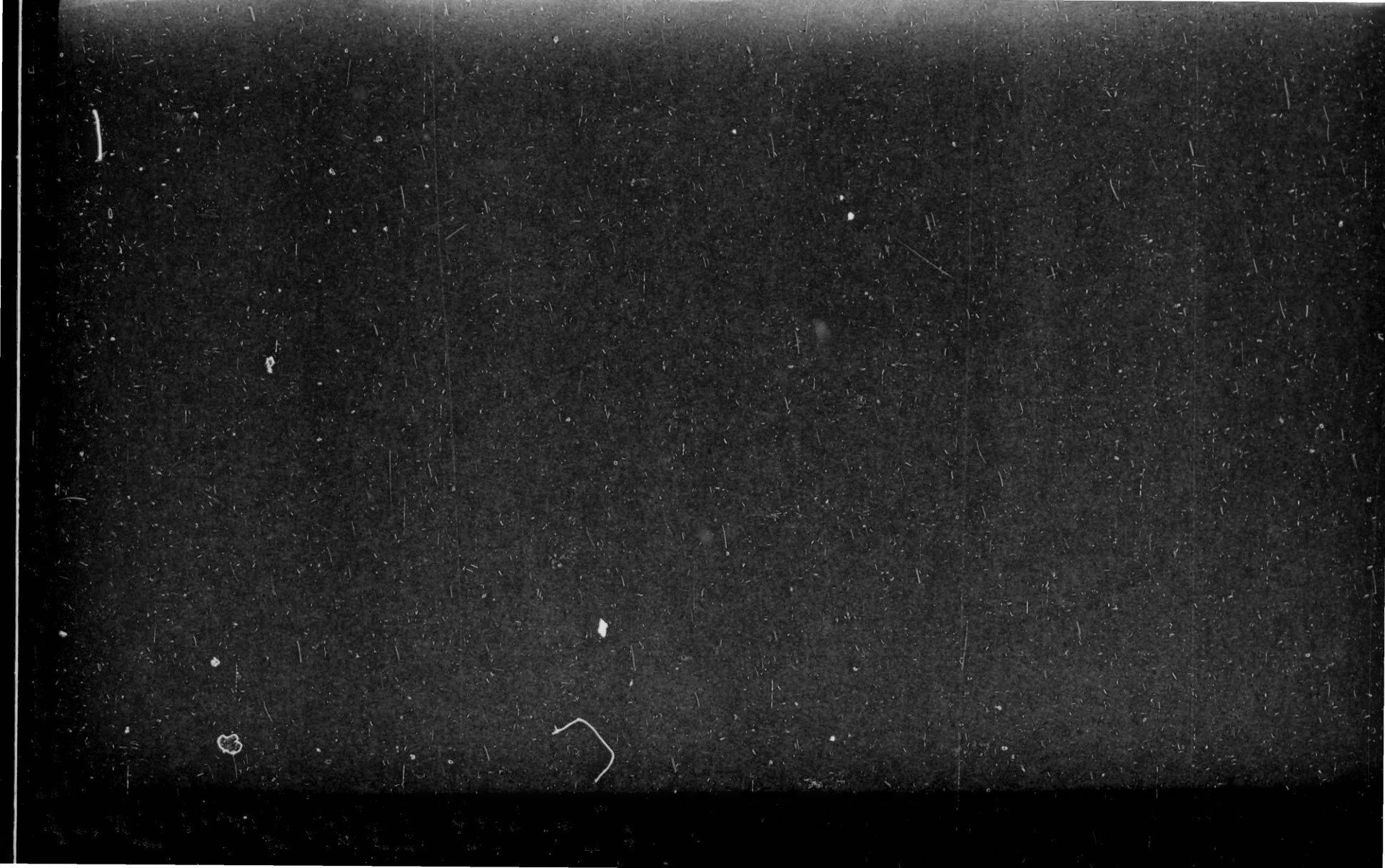
William T. Crisp
Counsel of Record
Robert F. Page
320 South Salisbury Street
Post Office Box 751
Raleigh, North Carolina 27602
(919) 833-2556

Attorneys for: Henry J. Truett; Cherokee, Graham and Jackson Counties: Towns of Andrews, Bryson City, Dillsboro Robbinsville and Sylva; Swain County Board of County Commissioners; and the Tribal Council of the Eastern Band of Cherokee Indians

THE PUBLIC STAFF
N.C. UTILITIES COMMISSION

Robert Gruber,
Executive Director
James D. Little, Staff Attorney
Post Office Box 29520
Raleigh, N.C. 27626-0520
(919) 733-6110

Attorney for: Using and Consuming Public



QUESTION PRESENTED

Does the opinion and order of the North Carolina Supreme Court remanding the matter to the North Carolina Utilities Commission for further consideration, present a substantial federal question?

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STATE OF NORTH CAROLINA, *ex rel.* UTILITIES COMMISSION; LACY H. THORNBURG, ATTORNEY GENERAL, *et al.*,

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On Appeal from the Supreme Court of North Carolina

APPELLEES' MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM JUDGMENT OF THE NORTH CAROLINA SUPREME COURT

STATEMENT OF THE CASE

Appellees agree with Appellants that the Federal questions of this case are identical to these of Nantahala I[1] and Nantahala II[2]. For that reason, the opinion of this Court in Nantahala I could very well control the outcome of this case. Despite the fact that the North Carolina Supreme Court[3] remanded this case to the North Carolina Utilities Ccmmission (NCUC) for further proceedings, the North Carolina Supreme Court's remand order is

[1] *Nantahala Power and Light Co. v. North Carolina ex rel Utilities Commission*, presently before this Court as Case No. 85-568.

[2] *Nantahala Power and Light Co. v. North Carolina ex rel Utilities Commission*, jurisdictional statement pending in Case No. 85-1165.

[3] *North Carolina ex rel. Utilities Comm., et al v. Edminsten, Attorney General, et al*, 314 N.C. 122; 333 S.E.2d 453 (1985).

a final judgment with respect to the federal questions potentially to be raised by a retail ratemaking order using the roll-in methodology. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

From a legal standpoint, however, except with respect to the federal questions which could be presented upon remand if the NCUC adopted a roll-in ratemaking methodology, this case is quite different from Nantahala I and II. In those two cases roll-in was adopted by the NCUC, while in the current case roll-in was not adopted.

This is a retail rate case filed by Nantahala Power and Light Company (Nantahala) before the NCUC. Appellees offered extensive evidence that:

(1) Tapoco Inc. (Tapoco) is a North Carolina public utility;

(2) Tapoco and Nantahala operate a single unified North Carolina electric public utlity system;

(3) Aluminum Company of America, Inc. (Alcoa), as the 100% parent of Nantahala and Tapoco, is, pursuant to N.C.G.S. 62-3(23)(2), a North Carolina public utility to the extent of its effect on Nantahala's retail rates and services; and

(4) Alcoa is the dominant parent of Nantahala and Tapoco to the detriment of Nantahala and its ratepayers. Appendix to Jurisdictional Statement ("A."), p. 10a.

However, the NCUC failed to give even "minimal" consideration to this evidence (A. pp. 31a-32a) and ordered a rate increase for Nantahala as a "stand-alone" company without combining the Nantahala-Tapoco financial data using the roll-in ratemaking methodology. For this error, the North Carolina Supreme Court remanded the proceeding to the NCUC with in-

structions to consider such evidence, together with the feasibility, of setting Nantahala's retail rates using the roll-in methodology (A. p. 51a).

From an evidentiary standpoint, the major difference, other than the applicable test year, between this case and Nantahala I and II is that the New Fontana Agreement (NFA)[4] and the Nantahala/Tapoco 1971 Apportionment Agreement (1971 Agreement)[5] expired before the conclusion of hearings at the NCUC in this case. These agreements have, for all practical purposes, been replaced by two other, newer agreements with TVA.[6]

The 1983 Nantahala-TVA Interchange Agreement is a supplemental power agreement whereby Nantahala controls and retains its own generation, selling its excess to and buying its shortfall from TVA (A. p. 22a). The 1983 Tapoco-TVA Exchange Agreement is similar to the NFA, in that Tapoco turns its generation over to TVA at the time of production and receives in return

[4]The NFA was a contract between Nantahala, Tapoco and Alcoa, on the one hand, and the Tennessee Valley Authority (TVA) on the other, by which Nantahala and Tapoco turned over, at generation, virtually all of their power to TVA and received, in return from TVA, power of a finite quality to be divided among the three companies as Alcoa decided. Under this agreement, Nantahala and Tapoco are treated as a combined power system. The NFA did not establish the power costs of the individual companies and is merely a power exchange (i.e., barter) agreement.

[5]The 1971 Agreement was a contract imposed upon Nantahala and Tapoco by Alcoa to divide the return power entitlements from TVA under the NFA. The 1971 Agreement did not, in and of itself, establish power costs of either Nantahala or Tapoco for wholesale or retail ratemaking purposes.

[6]These newer agreements are: (1) The 1983 Tapoco-TVA Exchange Agreement; and (2) The 1983 Nantahala- TVA Interconnection Agreement. The two agreements are sometimes referred to, collectively, as the "Fontana III Agreements". In a consolidated series of Federal Energy Regulatory Commission (FERC) Dockets (ER-82-774-000, ER 83-209-000, ER 83-227-000, ER 82-829-000, ER 83-219-000, EL 83-2-000, EL 84-29-000), Nantahala and Tapoco are seeking FERC's permission to terminate the NFA and the 1971 Agreement as rate schedules. The Companies filed the two new agreements for approval, and complaint actions by some of these Appellees (and others), were filed alleging a discriminatory structure, within the Alcoa power system and, among other things, seeking to force Tapoco to actually sell a portion of its electric power to Nantahala. All of these cases are pending final decision before FERC.

a finite quantity of firm energy suitable for Alcoa's smelting and fabricating load (A. p. 21a).

With regard to the impact of the Fontana III Agreements upon the feasibility of the roll-in ratemaking methodology, the North Carolina Supreme Court below stated:

> As to the factual circumstances concerning Tapoco's status as a North Carolina public utility, absolutely no change in condition has been shown to have occurred since entry of the [North Carolina Utilities] Commission's prior [Sub 29 and Sub 35] orders. Similarly, the evidence again demonstrated the existence of a single electric system composed of the dams, transmission, and distribution lines of Nantahala and Tapoco by location, design, and history and owned by a single corporation parent, Alcoa. The only circumstance which has changed under the Fontana III Agreements is the fact that the hydro resources of the single system are no longer coordinated as a single unit by TVA by virtue of the contractual agreement with the Alcoa system as they were under the OFA [Original Fontana Agreement of 1942] and NFA. Under Fontana III, only the four hydroelectric plants of Tapoco are dispatched by TVA against the TVA load in exchange for return power entitlements. As a result of Nantahala's exclusion from the terms of the 1983 Tapoco-TVA Exchange Agreement, Nantahala dispatches its own generation, and has accordingly been required to install $100,000 worth of equipment for dispatching purposes.
>
> In all other material respects, the evidence introduced by the intervenors indicates that very little has changed in the conditions under which Nantahala and Tapoco operate. There has been no change in Nantahala's production capability or in its physical interconnection with Tapoco. Nantahala continues to serve the same assigned area, including the portion of North Carolina in which Tapoco Village, Santeetlah

and Cheoah are located; and Tapoco continues to own the Santeetlah and Cheoah power facilities. Obviously, no change has occurred in the history of the system's design and, in essence, Nantahala remains by its historical development a component part of a unified system, since it was not designed to operate as a stand-alone utility. The legacy of this development in terms of power supply is the undeniable fact that Nantahala's generation is still not adequate to serve its public load, and Nantahala is still constrained to purchase its supplemental power and energy from TVA. Under the terms of its new agreement, Tapoco exchanges power with TVA much the same as it did under the 1962 New Fontana Agreement, and Nantahala, under its 1983 Interconnection Agreement, continues to sell power to TVA when it has excess generation to dispose of.

In other words, the only change that has occurred with respect to the "single system" since the two prior rate orders were entered by the Commission, and affirmed on appeal, is the single fact that new power supply contracts with TVA were entered into and, as an incident to the change, Nantahala dispatches its own generation. The evidence also indicates that under the new arrangements, Nantahala is dispatching its plants in much the same way as TVA had under the NFA (A. pp. 26a-27a.)

The Fontana III Agreements were filed with the FERC and accepted for filing by order of February 18, 1983. 22 *FERC para.*61,209. The Agreements do not allocate costs; rather, each separately coordinates power as between each company and TVA so as to maximize the economic benefit of each company's generating plants. No power is sold as between Nantahala and Tapoco. The Agreements do not and cannot allocate costs of the Tapoco/Nantahala single North Carolina electric public utility system.

STATEMENT OF FACTS

The historical facts that establish the proof of the four issues of Tapoco and Alcoa as North Carolina public utilities, the Nantahala/Tapoco unified, single electric public utility system and Alcoa's domination of Nantahala and Tapoco, for its own interests and to the detriment of Nantahala and the using and consuming public, are essentially identical to those of Nantahala I (Case No. 85-568) as summarized in "Appellee's Motion to Dismiss Appeal And Motion To Affirm Judgment Of The North Carolina Supreme Court" (Motion pp. 4- 11). For the convenience of the Court, those facts will not be repeated here. The only significant factual variation is with respect to the lapse of the NFA and the 1971 Agreement, and the concurrent commencement of the Fontana III Agreements. As noted hereafter, the Court may, at some point, wish to request additional briefs confined to the sole issue of the impact of the Fontana III Agreements, if any, on the two constitutional issues raised here, in view of the Court's ultimate holdings to be decided in Nantahala I.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellees move to dismiss the Appeals of Alcoa, Tapoco and Nantahala for the reason that they present no substantial federal questions. In addition, Appellees move to affirm the Judgment and Opinion of the North Carolina Supreme Court on the ground that such opinion, based upon the facts determined below, was correctly decided. Finally, Appellees contend that the Appeal should not be favorably treated, alternatively, as a Petition for Writ of Certiorari and that a Writ of Certiorari should not issue.

ARGUMENT

I. THE OPINION AND ORDER OF THE NORTH CAROLINA SUPREME COURT, REMANDING THE MATTER TO THE NORTH CAROLINA UTILITIES COMMISSION FOR FURTHER CONSIDERATION, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Consistently with their Motions to Dismiss previously filed in the earlier, companion retail cases arising from other NCUC (Nantahala I and Nantahala II; See Footnotes 1 and 2, *supra*), Appellees contend that this matter should be dismissed and/or that the opinion of the North Carolina Supreme Court should be affirmed. Alternatively, since Appellees are fully aware of the Court's decision to note probable jurisdiction in Nantahala I, and since Appellees do not wish to burden the Court with needless and repetitive arguments and briefs, Appellees do not resist Appellants' suggestion that this matter, like Nantahala II, should simply be retained on the Court's docket pending the Court's final decision in Nantahala I. In view of the presence, in this case, of the Fontana III Agreements (in addition to the NFA and the 1971 Agreement, which were in effect throughout the test year, but lapsed prior to the hearings at the NCUC), Appellees respectfully suggest that the Court may wish to request additional briefs limited to the sole question of the impact, if any, of the Fontana III Agreements on the Court's holding(s) in Nantahala I, after that case has been decided. (Such additional briefs would not, in any event, be useful in Nantahala II since, except for the different test year, the relevant facts, including the NFA and the 1971 Agreement, are the same, in all material respects, as in Nantahala I.)

Despite Appellees' agreement that this case, except for the Fontana III Agreements and the different test year, is essentially consistent with Nantahala I, in order to fully protect the public's interests and to fully comply with this Court's Rules, Appellees briefly set forth hereafter their arguments in support

of our Motion that this Court should not note probable jurisdiction and should dismiss the appeal.

A. The Roll-In Is Not Barred By The Federal Power Act.

The remand by the North Carolina Supreme Court to the NCUC is based upon the NCUC's failure to give even minimal consideration to the four essential facts which were proved by Appellees' evidence. The four essential facts are:

1. Tapoco is a North Carolina public utility;

2. Alcoa, as the 100% parent of Nantahala and Tapoco, is, pursuant to N.C.G.S. 62- 3(23)(2), a North Carolina public utility to the extent of its effect on Nantahala's retail rates and services;

3. Tapoco and Nantahala operate a single, unified electric public utility system; and

4. Alcoa is the dominant parent of Nantahala and Tapoco to the detriment of Nantahala and its ratepayers.

None of these findings involve a federal question. Each was found to be a fact by the NCUC in Nantahala I and Nantahala II, based upon similar evidence. Had the NCUC made such findings and applied the roll-in methodology, the NCUC's decision would have been supported by adequate, non-federal grounds and would not be within the prohibitions of the federal preemption (filed rate) doctrine.

The roll-in ratemaking methodology would be used only to ensure just and reasonable rates for Nantahala's retail ratepayers under the unique circumstances of extreme corporate abuse of Nantahala by its parent, Alcoa, based upon a 40-year history of corporate manipulations, as well as upon unfair and unreasonable agreements entered into at the instance of Alcoa.

In essence, the Fontana III Agreements are coordination agreements with TVA by Nantahala and Tapoco, respectively. By insisting upon separate negotiations and separate contracts, Alcoa has, once again, attempted to prefer itself as a customer of the single system and to remove, from the public domain, hydroelectric resources originally built and dedicated to serve the public, in order to further Alcoa's own selfish, private manufacturing interests. The Fontana III Agreements do not purport to allocate the costs of a Nantahala/Tapoco single system. In this respect, Nantahala and Tapoco do not even have a contract, such as the 1971 Agreement, with one another where it would be possible for either the FERC or the NCUC to allocate costs. The actual Fontana III Agreements deal in power coordination and exchange, not costs.

While the Fontana III Agreements have been filed with (but not approved by) the FERC and the Appellants, once again, plead that the roll-in ratemaking methodology would violate the federal preemption (filed rate) doctrine, the Appellants have not lodged with this Court either the Agreements or the FERC orders accepting them as filed rates. Thus, the record before the Court is silent concerning either the contents of the Agreements (except as reported in Appendices C-F of the Appendix) or how application of the roll-in methodology would interfere or conflict with FERC's jurisdiction and authority.

The FERC, to date, has done nothing to change the terms of the Fontana III Agreements so as to convert them into cost allocation agreements. The Administrative Law Judge (ALJ), in the consolidated cases,[7] in considering FERC approval or modification of the Fontana III Agreements, has expressly declined to rule upon the prudence of the Nantahala-TVA Agreement. The ALJ stated:

> Moreover, it would be an entirely different story if Nantahala were proposing here to increase its

[7]Initial Decision Approving, With Conditions, Proposed Tariff Changes, 30 F.E.R.C. para. 63, 050; Presiding Judge's Rulings Upon Motions for Reconsideration of Initial Decision, 31 F.E.R.C. para. 63, 056. These several cases are currently before the Commission for reconsideration on exceptions by all parties.

> own rates and pass through to its customers the costs associated with the two-part rate being assessed by TVA under the interconnection agreement. In that instance, it would be altogether appropriate to decide under the Federal Power Act whether Nantahala had been prudent in entering into the agreement on the terms that it did. If it were then determined that the company had not, Nantahala would be barred from passing through to its wholesale customers some or all of these costs. The fact is, however, that Nantahala is not trying in this case to raise its rates, and there is no reason to evaluate the company's actions from the standpoint of prudence. 30 FERC para. 63,050, p. 63,077.

Furthermore, with respect to the obligation of Tapoco to sell or directly allocate some of its power to Nantahala, the ALJ concluded that such a sale would be in the public interest, under the Federal Power Act, as follows:

> In these circumstances, the plants [Tapoco's] are still clothed with a duty to serve the public, at least during the time that Nantahala tries to become self-sufficient as an independent public utility. For this period, Nantahala's ratepayers have a legitimate claim to receive a priority to the low-cost power attributable to the Cheoah and Santeetlah [i.e.-Tapoco's North Carolina facilities] after the coordination and exchange arrangements take place with TVA. 30 FERC para. 63,050, p. 63,084.

Accordingly, the prospective roll-in (after remand to the NCUC) is based on non-federal grounds for at least three reasons. First, although the FERC accepted jurisdiction of the Fontana III Agreements, the ALJ declined to make any inquiry into the prudence of the Nantahala- TVA Interconnection Agreement with respect to cost responsibility and, with respect to Tapoco,

he ordered a temporary sale of Tapoco power to Nantahala. See, *Philadelphia Electric Co.*, 15 F.E.R.C. para. 61,264, at p. 61,601 (1981); *Pennsylvania Power and Light Co.*, 23 F.E.R.C. para. 61,006, at p. 61,009 (1983). Based upon the foregoing, it is proper for a state commission to determine whether the costs of a single Nantahala-Tapoco system (if one should be found to exist on remand) should be borne by Nantahala's retail ratepayers or its stockholders. *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696 (1985).

Second, even though the Fontana III agreements *may apportion power* (which Appellees do not concede) as between Nantahala and Tapoco, they do not apportion costs, much less the costs of a single Nantahala-Tapoco electric system.

Third, it is clear that federal and state regulatory commissions can adopt different ratemaking methodologies. *Mid-Tex Electric Cooperative, Inc. v. FERC*, 733 F.2d 327 (D.C. Cir., 1985). The FERC has not utilized the Fontana III Agreements to fix Nantahala's wholesale rates, but even if it had, the NCUC is no more bound to use the FERC's ratemaking techniques than the FERC is bound to use the NCUC's techniques. Merely because the FERC has, to date, declined to adopt a roll-in methodology as an appropriate form of relief in the consolidated cases,[8] it does not follow that the NCUC is precluded from adopting the roll-in methodology to set Nantahala's retail rates.

The *Narragansett* line of cases[9] remains inapplicable to the current case (should the roll-in ratemaking methodology be adopted on remand) for the reason that, in each of these cases,

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[8]30 FERC para. 63, 050, at p. 63, 081.

[9]*Narragansett Electric Co. v. Burke*, 119 R.I. 559; 381 A.2d 1358 (1977); *cert. denied*, 435 U.S. 972 (1978); *Northern States Power Co. v. Hagen*, 314 N.W. 2d 32 (N.D. 1981); *Northern States Power Co. v. Minnesota Public Utilities Commission*, 344 N.W. 2d 374 (Minn. 1983); *cert. denied*, 104 S. Ct. 3546 (1984); *United Gas Corp. v. Mississippi Public Service Commission*, 240 Miss. 405; 127 So.2d 404 (1961); *City of Chicago v. Illinois Commerce Commission*, 13 I11.2d 607; 150 N.E.2d 776 (1958); *Citizens Gas Users Assn. v. Public Utilities Commission of Ohio*, 165 Ohio 536; 138 N.E.2d 383 (1956); *Office of Public Counsellor v. Indiana & Michigan Electric Co.*, 416 N.E.2d 161 (Ind. App. 1981).

a state commission attempted to avoid passing on to retail ratepayers a FERC-approved cost. In the current case, the roll-in does not mandate the exclusion of certain costs, but rather contemplates, as would any other allocation technique, the proper allocation of *all* costs. In addition, none of the *Narragansett* line of cases involve the unique facts, specifically the parental domination by Alcoa, of this case.

B. The Roll-In Is Not Barred By The Commerce Clause.

Since the roll-in, which is simply a cost accounting methodology, would neither divert, directly or indirectly, any power from Tapoco/Alcoa to Nantahala nor create a preference for North Carolina ratepayers, there would be no intrusion upon interstate commerce so as to constitute a violation of the Commerce Clause of the United States Constitution. The preference prohibition of *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (NEPCO) is not applicable here. The roll-in, if adopted on remand, would not be implemented for the purpose of granting an unfair preference to North Carolina. Instead, its sole purpose would be to set fair and reasonable retail electric rates for an Alcoa subsidiary which was utterly dominated by Alcoa for Alcoa's benefit and to the ratepayers' significant detriment.

Any economic benefit arguably favoring North Carolina ratepayers would flow from an evenhanded effectuation of a legitimate local public interest and would place, if any, only an incidental burden on interstate commerce. Any such indirect economic benefit is permissible under the test of this Court as laid down in *Pike v. Bruce Church*, 397 U.S. 137 (1970).

CONCLUSION

Consistently with their positions in Nantahala I and Nantahala II (that this case rests on adequate, non-federal grounds and involves no substantial federal question), Appellees urge dismissal of this appeal and affirmance of the decision of the North Carolina Supreme Court. Alternatively, if the Court is of

a view towards noting probable jurisdiction, the Court should simply retain this case on its docket, pending the Court's decision in Nantahala I (Case No. 85-568). Prior to a final decision herein, the Court may wish to request additional briefs regarding the impact of the Fontana III Agreements on the Court's ultimate holding(s) in Nantahala I.

Respectfully submitted this 5th day of March, 1986.

CRISP, DAVIS, SCHWENTKER PAGE & CURRIN

William T. Crisp
Counsel of Record
Robert F. Page
320 South Salisbury Street
Post Office Box 751
Raleigh, North Carolina 27602
(919) 833-2556

Attorneys for: Henry J. Truett; Cherokee, Graham and Jackson Counties: Towns of Andrews, Bryson City, Dillsboro Robbinsville and Sylva; Swain County Board of County Commissioners; and the Tribal Council of the Eastern Band of Cherokee Indians

LACY H. THORNBURG
ATTORNEY GENERAL
OF NORTH CAROLINA

Richard L. Griffin
Assistant Attorney General
N.C. Department of Justice
Suite 207
Hayes & Hobson Building
20 South Spruce Street
Asheville, N.C. 28801
(704) 258-6083

Attorneys for: Using and Consuming Public

THE PUBLIC STAFF
N.C. UTILITIES COMMISSION

Robert Gruber,
Executive Director
James D. Little, Staff Attorney
Post Office Box 29520
Raleigh, N.C. 27626-0520
(919) 733-6110

Attorney for: Using and Consuming Public